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No. 87-1956

In the Supreme Court of the Uni

OCTOBER TERM, 1988

ANTHONY M. FRANK,
POSTMASTER GENERAL OF THE UNITED STATES, ET AL.,
APPELLANTS

v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

REPLY MEMORANDUM FOR THE APPELLANTS

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In our jurisdictional statement, we explained that the district court's judgment holding the prize list clause facially unconstitutional under the First Amendment expressly conflicts with this Court's decisions in *Ex parte Jackson*, 96 U.S. 727 (1878), and *In re Rapier*, 143 U.S. 110 (1892), both of which upheld predecessor versions of 18 U.S.C. 1302 over similar First Amendment challenges. We also explained that, under this Court's 1986 decision in *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, which upheld over a First Amendment challenge a restriction on the commercial advertising of casino gambling, the prize list clause is a valid restriction on the use of the mails for the purpose of promoting lotteries. Appellee[1]

[1] Although the appeal in this case has a higher docket number than the related appeal in No. 87-1943 taken by the Minnesota Newspaper Assocation, Inc., the government has also taken an appeal from the district court's judgment. We will therefore refer to the Association as the appellee to avoid confusion.

does not deny that the district court's decision conflicts with *Ex parte Jackson, supra*, and *In re Rapier, supra*, and appellee does not even cite (much less distinguish) this Court's closely-analogous decision in *Posadas de Puerto Rico Assocs.* v. *Tourism Co., supra*. Appellee has thus failed to offer a reason why this case does not warrant plenary review by this Court. Instead, appellee offers three reasons why the district court was correct. None is persuasive.

1. As we explained in our jurisdictional statement (at 11-18) the district court's judgment rests on an erroneous interpretation of 18 U.S.C. 1302. Congress enacted the prize list clause in order to prohibit the use of the mails for the commercial promotion of lotteries, not to inhibit public debate on their social or economic merits. Although appellee defends the district court's interpretation of the prize list clause, appellee's entire argument rests on the same mistaken premises. Mot. to Aff. 2-3. Like the district court, appellee believes that advertising is the only form of commercial speech. Moreover, because Section 1302 contains both an advertisement clause and a prize list clause, appellee believes that the prize list clause would be superfluous unless it applies to something other than noncommercial speech. As we have already shown, however, the Court's commercial speech decisions suggest that both premises are wrong: Commercial speech is not coterminous with advertising, and either the publication by a newspaper of a prize list for which it receives direct compensation or the publication by a newspaper of a prize list for a lottery conducted by the newspaper itself, should be regarded as forms of commercial speech, even though neither would be regarded as advertising. Because appellee's premises are wrong, its statutory construction argument necessarily fails.

2. Appellee claims (Mot. to Aff. 5) that the constitutionality of the prize list clause is "largely insignificant," since most prize lists are published as part of advertisements, and the district court upheld the advertisement clause in the statute. That contention, however, overlooks the fact that the district court held the prize list clause facially unconstitutional under the First Amendment in all its possible applications. J.S. App. 20a-22a. Thus, the district court's *judgment* goes far beyond prize lists that appear in newspaper advertisements or (as the district court erroneously thought was contemplated by the statute) legitimate news stories. It would also prohibit enforcement of the statute against prize lists sent through the mails in circulars, pamphlets, or "publication[s] of any kind" (18 U.S.C. 1302), including a flyer used in an illegal numbers racket. And as we have argued, it would prohibit enforcement of the statute against a newspaper that is engaged in the direct promotion of a lottery when that promotion takes the form of the paid publication of prize lists, rather than advertisements. Taken together, it is implausible to assert that these consequences of the district court's judgment are "insignificant." This Court recently made clear that a statute may not be held facially invalid under the First Amendment unless " 'every application of the statute create[s] an impermissible risk of suppression of ideas,' " or there is " 'a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the [c]ourt.' " *New York State Club Ass'n* v. *City of New York*, No. 86-1836 (June 20, 1988), slip op. 8 (citation omitted). When the prize list clause is properly construed, it may constitutionally be applied to regulate the distribution through the mail of commercial speech promoting lotteries without infringing the First Amendment rights of appellee or other parties. Because appellee has made no

effort to defend the district court's judgment, as opposed to its expression of concern about the possible (and in our view erroneous) application of the statute to news stories or editorials, that judgment clearly warrants plenary review by this Court.

3. Appellee contends (Mot. to Aff. 5) that the difficulty in distinguishing commercial speech from bona fide news stories will deter newspapers from publishing news stories about lotteries. That argument is implausible; a newspaper can easily tell whether it was paid to publish a prize list, or whether it will receive a share of a lottery's proceeds, or whether the newspaper is itself sponsoring a lottery. But even if appellee's argument had merit, it would only mean that courts should give the benefit of the doubt to articles that cannot be readily identified as commercial speech, rather than political speech. Appellee's argument does not require the Court to abandon the commercial speech doctrine altogether. This Court refused to do so two Terms ago in *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, *supra*, and appellee has given no reason why the Court should do so now.[2]

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[2] We observed in our jurisdictional statement (at 19-20 n.25) that the House of Representatives was considering a bill, known as the Lottery Advertising Clarification Act of 1988, that would expand the exemption in 18 U.S.C. 1307 to include materials promoting a lottery that is not illegal under state law. The House has now passed that bill, and it is currently before the Senate. We will, of course, keep the Court advised of any further progress on that bill and on what effect, if any, the bill would have on this case should it be enacted into law.

On June 27, 1988, the President signed into law Pub. L. No. 100-352. Although Section 1 of that law repealed 28 U.S.C. 1252, that repeal does not affect this case. Section 7 of the statute provides that it "shall take effect ninety days after the date of the enactment of this Act * * * [and] shall not apply to cases pending in the Supreme Court on the effective date * * * or affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date."

It is therefore respectfully submitted that, for the foregoing reasons and those given in our jurisdictional statement, this Court should note probable jurisdiction over this appeal.[3]

CHARLES FRIED
Solicitor General

JULY 1988

[3] As we explained in our response to the jurisdictional statement in No. 87-1943, the Court should also note probable jurisdiction over that appeal and consolidate that case with this one.

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